No. 95-227

In The

Supreme Court of the United States

OCTOBER TERM, 1995

ALLIANCE FOR COMMUNITY MEDIA, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, PEOPLE FOR THE AMERICAN WAY, NEW YORK CITIZENS FOR RESPONSIBLE MEDIA, MEDIA ACCESS NEW YORK, BROOKLYN PRODUCERS' GROUP, and DAVID CHANNON,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW YORK CITY PETITIONERS

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QUESTION PRESENTED

1. Whether Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 implicates state action and therefore triggers First Amendment scrutiny because the media Section 10 regulates — cable access channels — are public fora by tradition and designation.

LIST OF PARTIES

The judgment here reviewed was rendered in a proceeding in the United States Court of Appeals for the District of Columbia Circuit addressing four petitions for review of orders of the Federal Communications Commission.

Petitioners are listed on the cover. In addition to those listed on the cover, respondents include Denver Area Educational Telecommunications Consortium, Inc. and American Civil Liberties Union. The foregoing respondents are petitioners in no. 95-124, which has been consolidated with the present action, and their interests are aligned with those of petitioners here.

Respondents also include National Cable Association, Inc., which was an intervenor in all four proceedings before the court of appeals.

RULE 29.6 NOTATION

Petitioners have no parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals *in banc* ("the *in banc* court") is reported at 56 F.3d 105 (D.C. Cir. 1995), and is reprinted at App. 2a.[1] The panel opinion is reported at 10 F.3d

[1] Citations to "App. __a" refer to the appendix to the Petition for a Writ of Certiorari in No. 95-124.

812 (D.C. Cir. 1993), and is reprinted at App. 90a. The First Report and Order and Second Report and Order of the Federal Communications Commission (the "FCC") are reported at 8 FCC Rcd 998 (1993) and 8 FCC Rcd 2638 (1993), and reprinted at App. 128a and 178a, respectively.

JURISDICTION

The *in banc* court issued its decision on June 6, 1995. Petitioners in No. 95-124 filed their petition for certiorari on July 18, 1995. Petitioners in No. 95-227 filed their petition for certiorari on August 9, 1995. This Court granted certiorari on November 13, 1995. 64 U.S.L.W. 3347. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in relevant part, that: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, 1486 (1992), is reprinted at App. 126a.

Subsections 10(a), (b), and (d) amended §§ 612 and 638 of the Communications Act of 1934 ("the 1934 Act"), 47 U.S.C. §§ 532 & 558 (1988 & Supp. V 1993), Stat. App. 2a-6a.[2] Subsection 10(c) appears in a note following 47 U.S.C. § 531, Stat. App. 2a.

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[2] Citations to "Stat. App. ___" refer to the Statutory Appendix attached to the Petition for a Writ of Certiorari in No. 95-227.

The FCC promulgated regulations to implement Section 10 of the 1992 Act that are codified at 47 C.F.R. §§ 76.701 and 76.702 and that are reprinted at App. 170a and 197a, respectively.

STATEMENT

Petitioners, the New York Citizens Committee for Responsible Media ("NYCCRM"), Media Access New York ("MANY"), the Brooklyn Producers' Group ("B-PROD"), and David Channon (collectively, "New York City Petitioners"), represent cable public and leased access producers in New York City, as well as cable subscribers who view access programming.[3] Although New York City Petitioners joined in the petition for certiorari filed by Petitioners' Alliance for Community Media, *et al.*, they are filing this separate brief to address one important issue that New York City Petitioners believe may otherwise not receive adequate attention, namely, whether cable public access

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[3] NYCCRM is a coalition of individuals and non-profit organizations concerned with issues of public access to the electronic media in New York City. Its membership includes cable public and some leased access producers, community organizations, independent filmmakers, and cable subscribers who regularly view cable access programming. MANY is an unincorporated association of public and some leased access producers and cable subscribers created to promote the rights of cable access producers in Manhattan. B-PROD is an ad hoc group of public access producers and cable subscribers formed to promote cable public access in Brooklyn. David Channon is a critically acclaimed Manhattan public access producer whose series of programs devoted to arts and culture, "Dave Channon's Volcanic Video," occasionally features sexual images. Because New York City Petitioners primarily include public access producers, the argument here primarily focuses on the public forum status of public access channels.

channels qualify as public fora, thereby rendering censorship of those channels by cable operators state action subject to First Amendment scrutiny. The importance of this issue transcends this case.[4]

New York City Petitioners incorporate by reference Petitioners Alliance for Community Media, *et al.*'s Statement of the Case but supplement the same to set forth the *in banc* court's views on the public forum doctrine issue.

The *in banc* court held that leased and public access channels were not public fora. *Alliance for Community Media*, 56 F.3d at 121-23 (App. 29a-31a). Implicitly assuming that such cable channels were purely private property owned by cable operators, the *in banc* court ruled that leased and public access channels could not qualify as public fora since the public forum doctrine only applied to public property. *Id.* (App. 29a-31a). While conceding that such channels had been dedicated to the public, the *in banc* court also ruled that they were not "so dedicated to the public" as to become public fora but were merely a form of common carrier regulation imposed on cable operators. *Id.* at 123 (App. 31a).

Judge Rogers concurred with the *in banc* court's public forum analysis stating that petitioners had failed to show on the record that leased and public access channels were public fora. *Id.* at 151 n.4 (App. 88a) (Rogers, J., concurring in part

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[4] *See, e.g., Glendora v. Cablevision Systems Corp.*, 893 F. Supp. 264 (S.D.N.Y. 1995) (censorship of programming critical of local public officials); *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989) (censorship of "racialist" public access programming). These cases illustrate why the public forum status of public access channels is of critical importance even to public access producers whose programs feature core political speech and lack sexual content.

and dissenting in part). In dissent, Judge Wald (joined by Judge Tatel) stated that the public forum status of leased and public access channels "is a close question." Judge Wald analogized creation of access channels to dedications of private land "for public access and use, including traditional First Amendment activities," which are often conditions of "land swaps, zoning approval, or building permits." Nonetheless, because Judge Wald found state action otherwise present when cable operators censor leased and public access channels pursuant to Section 10 of the 1992 Cable Act, she declined to decide whether such channels were public fora. *Id.* at 134 (App. 53a).

SUMMARY OF ARGUMENT

Since formal recognition in 1972, the public forum doctrine has become "a fundamental principle" of First Amendment jurisprudence, *Minnesota State Bd. for Community College v. Knight,* 465 U.S. 271, 280 (1984), resting on the proposition "that in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process." H. Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. 1, 11-12. Almost all cable franchise agreements require cable operators to dedicate a few cable channels for public access — channels which are "often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667. In many communities, these channels have become electronic public fora for uninhibited, robust and wide-open discussion of public issues.

The mere fact that public access channels are not tangible property like parks, streets and sidewalks does not render public forum analysis inapposite since the public forum doctrine may apply to any "particular means of communications," even if it "lacks a physical status."

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985). The doctrine is triggered when speakers seek access to "public property or private property dedicated to public use." *Id.* It applies in this case because public access channels are either public property, in whole or part, or private property dedicated to public use.

While cable systems are privately owned in most communities, private cable operators do not own all property interests in cable channels. Just as franchise agreements confer *private easements* on cable operators to continuously occupy public rights-of-way, so too they create *public easements* — and perhaps even transfer title — in cable channels dedicated to public access. The creation of public access channels during the franchising process is thus analogous to the dedication of land for public streets, squares, and parks — traditional public fora — during the subdivision development process.

Dedications of land for public use may occur pursuant to either statute or common law. *Poynter v. Johnson*, 114 Wis. 2d 439, 338 N.W.2d 484 (1983). Although statutory dedications typically require compliance with formal procedures, *Lambach v. Town of Mason*, 386 Ill. 41, 53 N.E.2d 601 (1944), there are no similar formalities for common law dedications, which merely require the owner's assent to dedication of land for public use. *City of Cincinnati v. White's Lessee*, 31 U.S. (6 Pet.) 431 (1832). Hence, common law dedications become effective even without deeds. *Jezek v. City of Midland*, 605 S.W.2d 544 (Sup. Ct. Tex. 1980). While such dedications seldom transfer title, they create public easements in dedicated land. *Town of Moorcraft v. Lang*, 779 P.2d 1180, 1183 (Sup. Ct. Wyo. 1989). The public thus gains a property interest in many respects as effective as transfer of fee title.

Similarly here, cable channels are dedicated for public access through the franchising process. Even if franchise

agreements transfer no title in public access channels, they create public easements in such channels. The public property interest in public access channels is at least as great as — and perhaps greater than — the public property interest in lands subject to common law dedications.

The fact that cable operators have long been barred from exercising editorial control over public access channels further confirms that they do not own all property rights in those channels. Time and again, the Court has recognized that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). Since cable operators lack the right to exclude public access programmers, they lack an essential stick in the property rights in public access channels.

Even if public access channels are purely private property, the public forum doctrine remains relevant in this case because such channels are "dedicated to public use." *Cornelius*, 473 U.S. at 801. Contrary to the *in banc* court's view, the Court has applied the public forum doctrine in several cases involving private property dedicated to public use. *See, e.g., United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981). The Court has also assumed that the doctrine was applicable in other cases involving private property dedicated to public use. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 103 (1980). The Court's recent suggestion that public forum analysis does not apply to privately owned transportation terminals was mere dictum in a case involving publicly owned transportation terminals and overlooked precedent relevant here. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2703 (1992). Moreover, *Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), on which the *in banc* court heavily relied, are inapposite since the private shopping centers in those cases

had not been dedicated by government to public use, as was the case in *Pruneyard*.

Finally, any notion that the public access doctrine applies only to public property is effectively refuted by the longstanding application of public forum analysis to all public streets, *Frisby v. Schultz*, 487 U.S. 474 (1988), *though most public streets are privately owned.* 11 McQuillin, *Municipal Corporations* § 30.32, at 280-81 (3d ed. rev. 1986). Since the public forum doctrine is indisputably applicable to all public streets, regardless of public or private ownership, a fortiorari, it must apply to private property dedicated to public use.

Public forum analysis begins by closely focusing "on the character of the property at issue," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983), to determine "whether it is public or non-public in nature." *Cornelius*, 473 U.S. at 800. Public access channels qualify as both traditional and designated public fora. While traditional public fora include parks, streets, and sidewalks, which have been held in trust for expressive activity "from time out of mind," *Hague v CIO*, 307 U.S. 496, 515 (1939), they also include fora opened for public expression by "government fiat," *Perry*, 460 U.S. at 45, and "recent convention." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984). Not only have public access channels been opened for public expression by "government fiat" but they also have a tradition of public expression in many communities. Assuming arguendo that public access channels are not traditional public fora, they are nonetheless designated public fora since they have been opened by government for public expression on a first-come, first-served, nondiscriminatory basis.

ARGUMENT

The public forum doctrine has been described as "a fundamental principle of First Amendment doctrine."

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 280 (1984). Although not formally introduced into First Amendment jurisprudence until 1972, *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), its origins trace back to Justice Roberts' famous dictum in *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1.

The First Amendment derives, of course, from "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *See also Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment premised on "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"). In turn, the public forum doctrine rests on the proposition "that in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process." Kalven, *supra*, 1965 Sup. Ct. at 11-12.[5]

Almost all cable franchise agreements require cable operators to dedicate a few channels for public access — channels which "are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667. In many communities, these channels have "been used to promote

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[5] "Whether in a marketplace, a public square (like the ancient Greek agora), a country store, a barber shop, a school board, or a town meeting, democracy must have its local talk shop, its neighborhood parliament." B. Barber, *Strong Democracy* 267-68 (1984). Public fora are thus "a fundamental condition of democracy." Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. Rev. 633, 646 (1991).

nonprofit community organizations, involve senior citizens, present political issues, teach the mentally retarded to communicate, discuss current events, and present artists and entertainers." Mueller, *Contraversial Programming on Cable Television's Public Access Channels*, 38 DePaul L. Rev. 1051, 1064-65 (1989). In short, public access channels have become electronic public fora.

The mere fact that public access channels are not tangible property like parks, streets, and sidewalks does not render public forum analysis inapposite since the public forum doctrine may apply to any "particular means of communications," even if it "lacks a physical status." *Cornelius v. NAACP Lega. Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (forum analysis of charity drive aimed at federal employees); *accord Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510, 2517 (1995) (forum analysis applied to student activity fund having "metaphysical" rather than "spatial or geographic" character); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (forum analysis of school's internal mail system); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (forum analysis of advertising spaces in city buses).

I.

STATE ACTION IS PRESENT BECAUSE PUBLIC ACCESS CHANNELS ARE PUBLIC FORA.

A. THE PUBLIC FORUM DOCTRINE IS TRIGGERED.

Public forum analysis is triggered when speakers seek access to "public property or to private property dedicated to public use." *Cornelius*, 473 U.S. at 801. The public forum doctrine applies in this case because public access channels

are either public property, in whole or part, or private property dedicated to public use.

1. Public Access Channels Are Public Property.

While the facilities that comprise cable systems are privately owned in most communities,[6] private cable operators do not own all property interests in cable channels over those systems. Just as franchise agreements confer easements on private cable operators to continuously occupy public-rights-of-way, *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1993), so too they create public easements — perhaps even transfer title — in cable channels dedicated to public access. Indeed, these public access channels are part of the quid pro quo demanded by municipalities in return for granting private easements to continuously occupy public rights-of-way — easements upon which cable operators "depend for [their] very existence." *Id.*[7]

As Judge Wald observed in dissent below, *Alliance for Community Media*, 56 F.3d at 134 n.8 (Wald, J., dissenting)

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[6] There are approximately 60 municipally-owned cable systems in the United States. *Cable's New Competitors*, Broadcasting & Cable, Oct. 2, 1995, at 42. The in banc court's holding that public access channels on privately owned cable systems are not public fora, *Alliance for Community Media*, 56 F.3d at 121-23 (App. 29a - 31a), clearly does not preclude public fora status for public access channels on municipally owned cable systems.

[7] Although the Constitution protects property rights, they are created and defined by state law. *Paul v. Davis*, 424 U.S. 693, 710 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The 1984 and 1992 Cable Acts thus do not create or define property rights in public access channels. Instead, franchise agreements are the exclusive sources of property rights in those channels.

(App. 53a), the dedication of public access channels during the franchising process is thus analogous to the dedication of land for public streets, squares and parks — traditional public fora (see p. 21 *infra*) — during the subdivision development process.[8] Dedication of some land for such public uses, in particular, has been "the proverbial quid pro quo" for municipal approval of developers' subdivision plat plans, "almost since the inception of the subdivision notion." Karp, *Subdivision Exactions for Park and Other Space Needs*, 16 Am. Bus. L. J. 277, 279, 280 (1979). "Essentially all subdivision plats submitted for approval and filing [must] include new streets [and parks]." 4 R. Anderson, *American Law of Zoning 3d* § 25.32, at 376, § 25.39, at 392 (1986).[9]

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[8] Dedication has been defined as "the devotion of land to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used now or in the future [for public use]." 11 McQuillin, *Municipal Corporations* § 33.02, at 288 (3d ed. rev. 1986). "Many of the streets, alleys, squares and parks in municipal corporations have been acquired by a voluntary dedication of that property by the owner to the public." *Id.* While condemnation and prescription remain the most prevalent method for creation of public lands, "dedication for public use has provided a significant third course of effectuating public ownership." Note, *Public Ownership of Land Through Dedication*, 75 Harv. L. Rev. 1407, 1407 (1962).

[9] *See also* Freilich & Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to Nollan*, in *Exactions, Impact Fees and Dedications: Shaping Land-Use Development and Funding Infrastructure in the Dolan Era* 28 (R. Freilich & D. Bushek eds. 1995) ("most communities require the dedication of rights-of-way and the construction of facilities as a condition of plan approval, or in conjunction with rezoning of property"); Note, *Land Use — Mandatory Dedication for Park and Recreation Facilities*, 26 Ark. L Rev. 408, 409 (1972) (dedications of land for public use are "usually a prerequisite to acceptance and recordation of a subdivision map"). Even when

Dedications of land for public use may occur pursuant to either statute or common law. 1A C. Antieau, *Municipal Corporation Law* § 9.05, at 9-13 (1995); 11 McQuillin, *Municipal Corporations* § 33.03, at 294 (3d ed. rev. 1986); *Poynter v. Johnston*, 114 Wis. 2d 439, 338 N.W.2d 484 (1983); *Jezek v. City of Midland*, 605 S.W.2d 544 (Sup. Ct. Tex. 1980). Whereas statutory dedications typically require compliance with formal procedures, *Lambach v. Town of Mason*, 386 Ill. 41, 53 N.E.2d 601 (1944), "[t]here is no particular form or ceremony necessary in the [common law] dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation." *City of Cincinnati v. White's Lessee*, 31 U.S. (6 Pet.) 431 (1832); *accord* 1A Antieau, *supra*, § 9.05, at 9-13; 11 McQuillin, *supra*, § 33.03, at 294. Hence, "[a] common law dedication of realty to the public does not have to be shown by a deed." *Jezek v. City of Midland*, 605 S.W.2d at 549.

While common law dedications typically do not transfer title, they do create public easements in the dedicated land. 1A Antieau, *supra*, § 9.15, at 9-29; 11 McQuillin, *supra*, § 33.68, at 497; *Town of Moorcroft v. Lang*, 779 P.2d 1180, 1183 (Sup. Ct. Wyo. 1989). The public thus "acquire[s] . . . the right to use [the land] for the purposes for which it was dedicated," a property interest in many respects "just as effective as a statutory dedication." 11 McQuillin, *supra*, § 33.68, at 497 & § 33.03, at 294. Moreover, the dedication is irrevocable once accepted, as "neither the dedicator nor subsequent owners

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dedication of lands for public streets is not a prerequisite to subdivision plat approval, "it is the invariable practice for the [subdeveloper] to dedicate them to the town — among other reasons, because, as public streets, the expense will be shared by other landowners who benefit from them." *Brous v. Smith*, 304 N.Y. 164, 170, 106 N.E.2d 504, 506 (1952).

claiming under him can repudiate the grant and regain full possession of the [land.]" 1A Antieau, *supra*, § 9.15, at 9-32.

Similarly here, cable channels are dedicated for public access through the franchising process. Even if franchise agreements do not transfer title in public channels from private cable operators to the public, they surely create public easements in such channels. No deed of transfer is necessary to effectuate that public property interest. Once cable channels have been dedicated for public access, cable operators are no longer free to repudiate the dedication and regain full possession of those channels. The public property interest in public access channels is thus at least as great as — and perhaps greater than — the public property interest in private lands subject to common law dedications for public parks and streets.[10]

The fact that cable operators have long been prohibited from exercising editorial control over public access channels also shows that such channels are not purely private property. Time and again, this Court has recognized that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Absent such right to exclude, property cannot be deemed "reserved for private use" by a "private owner." *Nollan v. California Coastal Comm'n*, 483 U.S. 825,

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[10] These property interests may, of course, be enforced by municipalities and possibly even by public access producers as third party beneficiaries of franchise obligations dedicating cable channels for public access. *See, e.g., New York Citizens Committee on Cable TV v. Manhattan Cable Television, Inc.*, 651 F. Supp. 802, 815-17 (S.D.N.Y. 1986) (cable subscribers were third party beneficiaries of franchise obligation to give priority of access to cable channels to unaffiliated programmers).

831 (1987). Since cable operators have traditionally lacked the right to exclude programmers from using public access channels, they clearly do not own an essential stick in the bundle of property rights in those channels.

2. Even If Private Property, Public Access Channels Are Dedicated to Public Use.

Even if public access channels are privately owned, the public forum doctrine remains relevant in this case because such channels are "dedicated to public use." *Cornelius*, 473 U.S. at 801 (1985). The Court has repeatedly made clear that the doctrine is triggered when speakers seek access not only to property " 'owned' " by government but also property " 'controlled' " by the government, regardless of where title lies. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984), quoting *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981). *See also* Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1759 (1987) ("technicalities of property ownership" not dispositive of public forum status).

Contrary to the *in banc* court's view, *Alliance for Community Media*, 56 F.3d at 122 n.17 (App. 29a), this Court has applied the public forum doctrine in cases involving private property. Thus, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), a privately owned theater which a city had leased and made available for touring theatrical shows was declared a public forum for such expressive activities. *Id.* at 547, 555. Similarly, in *Greenburgh*, privately owned mailboxes were declared part of the Postal Service's non-public forum for delivery and receipt of mail. 453 U.S. at 132. The *in banc* court's strained suggestion that private ownership may have been dispositive of the First Amendment claim in *Greenburgh* is flatly contradicted by the Court's extensive discussion of the public forum doctrine. *Id.* at

126-33. *See also* Post, *supra*, 34 UCLA L. Rev. at 1797 n.305.[11]

Likewise, in upholding the right under one state constitution to petition in the common areas of a privately owned shopping center, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court virtually recognized that a public forum had thereby been created on private property. *Id.* at 83 (property owner may still restrict expressive activities by adopting time, place and manner regulations that minimize interference with commercial functions); *id.* at 103 (Powell, J., concurring) ("I do not interpret the decision as a blanket approval for state efforts to transform privately owned commercial property into public forums").

Even the Court's decisions preceding formal recognition of the public forum doctrine in the 1970's demonstrate that title is not dispositive in public forum analysis. Justice Roberts' famous dictum in *Hague v. CIO*, often cited as the seminal public forum doctrine decision, Kalven, *supra*, at 1964 Sup. Ct. Rev. at 12-14, declared that, "[w]herever the title of streets and parks may rest," these places were public fora. 307 U.S. at 515.[12] Similarly, in *Marsh v. Alabama*, 326 U.S. 501

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[11] While public utility poles are sometimes public property, *Taxpayers for Vincent*, 466 U.S. at 791-93 (public utility poles in Los Angeles deemed public property), they are typically private property. Nonetheless, the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles, Cal.*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986), recognized that "surplus space" on all public utility structures — both private owned and publicly owned — had become a kind of public fora, given the State of California's dedication of that "surplus space" for use by cable operators. *Id.* at 1400, 1408-09.

[12] *See also* Saphire, *Reconsidering the Public Forum Doctrine*, U. Cin. L. Rev. 59 739, 747 n.37 (1991) ("the contemporary notion of a public trust in streets has much less to do with property law concepts of ownership

(1946), the streets and sidewalks in a company-owned town were deemed public fora: "*Whether a corporation or a municipality owns or possesses the town* the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." *Id.* at 507 (emphasis added). Likewise, in *Evans v. Newton*, 382 U.S. 296 (1966), the removal of the City of Macon as trustee of a privately-owned park did not insulate park segregation policies from constitutional scrutiny. *Id.* at 299 (analogizing park to company-owned town in *Marsh v. Alabama*).[13]

To be sure, the Court has recently asserted that evidence of expressive activities in bus and rail terminals was "irrelevant to public fora analysis" because such "terminals traditionally have had private ownership." *Internat'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2707 (1992) (emphasis deleted). The public forum status of privately owned transportation terminals was not, however, an issue in *Lee*, which solely concerned the forum status of publicly owned airport terminals. *Id.* at 2703 (Port Authority of New

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than with a general societal understanding and expectation that, as quintessentially public places, most streets should, as a general matter, be open for non-transportational purposes").

[13] On the very same day that the Court formally recognized the public forum doctrine in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), it also upheld a municipal ordinance prohibiting "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school class while "on *public or private grounds* adjacent to any building in which a school or any class thereof is in session." *Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (emphasis added). Without differentiating between private and public property, the Court flatly stated that "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons." *Id.* at 115.

York and New Jersey owned and operated three major airport terminals in greater New York area). The assertion in *Lee* that the public forum doctrine does not apply to privately owned transportation terminals was thus mere dictum which ignored precedent relevant here.

Nor do *Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), render the public forum doctrine wholly inapplicable to private property, as the *in banc* court mistakenly believed. *Alliance for Community Media*, 56 F.3d at 122-23 (App. 30a-31a). Those decisions simply held that since "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action," a property owner, for purposes of those constitutional provisions, did not stand "in the shoes of the State" where he had merely invited the public "to use his [property] for designated purposes" and had not assumed all the functions of "a state-created municipality." *Lloyd Corp. v. Tanner*, 407 U.S. at 567, 569 (emphasis in original); *accord Hudgens v. NLRB*, 424 U.S. at 518-21. Neither case, however, involved a dedication of private property to public use by "state constitutional or statutory provision." *Pruneyard*, 447 U.S. at 81. *See also* Berger, *supra*, 66 N.Y.U. L. Rev. at 636 (state courts, in their common law traditions, and state legislatures, in the exercise of their regulatory powers, may open certain privately owned lands such as shopping centers to various forms of political activity).

Finally, any notion that the public forum doctrine is triggered only when speakers seek access to public property is effectively undermined by the fact that *most public streets are privately owned*:

> Although it is often affirmed that streets belong to the public, or to the state, such statements refer usually to rights of use or of control of the streets . . . rather than to legal rights appertaining to the ownership of land. . . . [T]he established rule of

> the common law followed by a majority of the states is that the abutting landowner will be held to own the fee in the public way in front of his or her property to the center of it, subject to the public easement, unless the owner has been divested of title, as by an accepted dedication, condemnation, or by other means.

11 McQuillin, *supra*, § 30.32, at 280-81; *accord* 1A Antieau, *supra*, § 9.02, at 9-5 ("it is the general rule at common law that the abutting owners are owner of the fee to the center of the street, with the local government having only an easement therein"). Since the public forum doctrine is indisputably applicable to all public streets, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (public streets in residential neighborhoods), regardless of public or private ownership, a fortiorari, it must apply to private property dedicated to public use.[14]

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In sum, the public forum doctrine is triggered because public access channels are either public property or private

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[14] *See, e.g., Mall, Inc. v. City of Seattle*, 108 Wash. 2d 369, 739 P.2d 668, 671 (Sup. Ct. Wash. 1987) ("the vast majority of Seattle streets, regardless of how acquired, are easements in which the abutter owns an underlying fee"); *Otto v. City of St. Paul*, 460 N.W. 2d 359, 361 n.1 (Ct. App. Minn. 1990) ("the abutting property owner owns to the middle of the platted street and all the soil and appurtenances within the limits of the street belong to the owner in fee, subject only to the public easement"); *Thies v. Howland*, 424 Mich. 282, 380 N.W.2d 463, 467 (1986) ("unless a contrary intent appears, owners of land abutting a street are presumed to own the fee to the center of the street, subject to the easement"); *Standard Brass Corp. v. Farmers Nat'l Bank of Belvidere*, 388 F.2d 86, 90 (7th Cir. 1967) (abutting lot owner holds title to street subject to public right to use street prior to vacation of that right).

property dedicated to public use. Applying public forum analysis, we now show that public access channels qualify as public fora.[15]

B. PUBLIC ACCESS CHANNELS ARE PUBLIC FORA BY TRADITION AND DESIGNATION.

Public forum analysis begins by closely focusing "on the character of the property at issue," *Perry*, 460 U.S. at 44, to determine "whether it is public or non-public in nature." *Cornelius*, 473 U.S. at 800. The public forum doctrine recognizes three categories of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius*, 473 U.S. at 800, citing

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[15] The *in banc* court also erred in characterizing public access channels as merely a form of common carrier regulation. *Alliance for Community Media*, 56 F.3d at 123 (App. 31a). Whereas public access channels were created to promote freedom of speech, common carrier regulation was created to address economic concerns with "no reference to the First Amendment." I. Pool, *Technologies of Freedom* 98 (1983). Indeed, the common carrier concept first evolved in the transportation industry, *see, e.g., Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7, 22 (1858), and later applied to telegraph and telephone companies. *See, e.g., Western Union Tel. Co. v. Call Publishing Co.*, 181 U.S. 92 (1901); Pool, *supra*, at 91. Even the FCC has recognized that public access channels are analytically distinct from common carrier regulation. Thus, when the Commission decreed that telephone companies may only offer video dialtone service to third party programmers on a "nondiscriminatory common carrier basis," it declined to require them "to set aside channel capacity at free or reduced rates for [public access]" because that was contrary to "the nondiscrimination objective." *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, 7 FCC Rcd 5781, 5783, 5805 (1992).

Perry, 460 U.S. at 45-46. Public access channels surely qualify as both traditional and designated public fora.

Traditional public fora consist of "[p]laces which by long tradition or by government fiat have been devoted to assembly or debate." *Perry*, 460 U.S. at 45. They include such "quintessential public for[a]" as "parks, streets, and sidewalks," *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992), places which have " 'immemoriably been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry*, quoting *Hague v. CIO*, 307 U.S. at 515.[16] Traditional public fora are, however, not limited to those places held in trust for expressive activity "from time out of mind" but also include fora opened for public expression by "government fiat," *Perry*, 460 U.S. at 45, and by "recent convention." *Taxpayers for Vincent*, 466 U.S. at 815 n.32.[17]

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[16] Justice Roberts' famous "time out of mind" dictum in *Hague v. CIO* is, of course, not historically accurate since public parks only came into existence in the late 18th and early 19th centuries. S. Carr, M. Francis, L. Rivlin, & A. Stone, *Public Space* 62 (1992); R. Rosenzweig & E. Blackmar, *The Park and the People: A History of Central Park* 3-4 (1992). Indeed, as late as 1893, the Court observed that "in the memory of men now living, a proposition to take private property [by eminent domain] for a public park . . . would [once] have been regarded as a novel exercise of legislative power." *Shoemaker v. United States*, 147 U.S. 282, 297 (1993). The "time out of mind" character of public parks is thus arguably "a matter of historical nearsightedness." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 n.9 (1985). *See also* M. Kammen, *Mystic Chords of Memory* (1991). It is perhaps more historically accurate to say that the availability of public parks for expressive activities is a matter of "recent convention." *Taxpayers for Vincent*, 466 U.S. at 815 n.32.

[17] To be sure, the Court recently declined in *Lee* to classify airport terminals

Public access channels qualify as traditional public fora not only because they have been opened for public expression by "government fiat" but also because they have a tradition in many communities as open fora for public expression — indeed, "as the video equivalent of the speaker's soap box or the printed leaflet." H.R. Rep. No. 934, *supra*, at 30, 1984 U.S.C.C.A.N. 4655, 4667. Since they are the electronic functional equivalent of such "quintessential public forums"

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as traditional public fora. 112 S. Ct. at 2705-06. That conclusion, however, only partially rested on the fact that such places had not been held in public trust for expressive activity " 'from time out of mind.' " *Id.* at 2706, quoting *Hague v. CIO*, 307 U.S. at 515. The Court also considered whether they had been open for expressive activities "even within the rather short history of air transport" and declined to classify airport terminals as traditional public fora only after noting that expressive activity had not become "common practice" in those places until "recent years." *Id.* at 2706.

Lee thus strongly suggests that the category of traditional public fora is not a closed one, confined only to parks, streets and sidewalks. Nor should it be since "the policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property." *Lee*, 112 S. Ct. at 2717 (Kennedy, J., concurring). *See also* Post, *supra*, 34 UCLA L. Rev. at 1759 (unexplained reliance on tradition "is a recipe for crude and arbitrary results").

The Court has recognized the pitfalls of excessive reliance on tradition in other areas. In determining whether federal regulations impaired the ability of the states " 'to structure integral operations in areas of traditional governmental functions,' " for example, the Court has held that "what is traditional" cannot be determined by "looking only to the past," since that would "impose a static historical view." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 686 (1982), quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

as "parks, streets and sidewalks," *Burson*, 112 S. Ct. at 1850, where speakers typically place their soap boxes and pamphleteers usually distribute their printed leaflets, public access channels belong in the very same category.[18]

Assuming arguendo that public access channels do not qualify as traditional public fora, they nonetheless qualify as designated public fora since they have been opened by government "for use by the public as [channels] for expressive activity." *Perry*, 460 U.S. at 45. Moreover, since public access channels are typically available for free use by the general public "on a first-come, first-served nondiscriminatory basis," *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 599 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988); *accord Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983) (access rules "mandate that all individuals be given the opportunity to appear on cable television on a nondiscriminatory first-come, first-served basis), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985), public access channels have been designated for *unlimited* public expression, contrary to Judge Wald's suggestion that they are merely "limited purpose" public fora. *Alliance for Community Media*, 56 F.3d at 134 n.8 (App. 53a).[19]

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[18] The Court's recent refusal in *Lee* to classify airport terminals as traditional public fora thus does not preclude traditional public forum status for public access channels. Whereas airport terminals have principally been used to facilitate passenger air travel and only recently for expressive activities, 112 S Ct. at 2706-07, *public access channels have always and exclusively been used for public expression.*

[19] While the *in banc* court declined to recognize the public forum status of public access channels, at least two federal district courts have recognized that public access channels are public fora. *Missouri Knights*, 723 F. Supp. at 1351-52 (plaintiff's averments, if true, make

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In sum, as the term "public access" implies, public access channels are public fora — both traditional and designated — for expressive activity. Indeed, once public forum analysis is applied, it is virtually impossible to conclude otherwise.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and Section 10 and its implementing regulations should be struck down as violative of the First Amendment.

Respectfully submitted,

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Kansas City's public access channel a traditional or designated public forum); *Altman v. Television Signal Corp.*, 849 F. Supp. 1335, 1340 (N.D. Cal. 1994) ("Public access and leased access channels were meant to serve as public forums, accessible to all interests, including those that may otherwise lack the resources to communicate through electronic media"). *But cf. Glendora*, 893 F. Supp. at 270 (accepting the *in banc* court's analysis with minimal discussion).

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